

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 8, 2004

Case No.: TIA-0317

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant filed on behalf of her late husband, a DOE contractor employee (the Worker) at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE

facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a machinist at the Oak Ridge plant, Y-12 (the plant). The Application states that he worked at the plant for 32 years, from 1957 to 1989. The Applicant requested physician panel review of two illnesses - emphysema and acute respiratory failure.

The Physician Panel rendered a negative determination. The Panel was not unanimous. All three Panel members agreed that the Worker was a machinist and was exposed to toxic substances. All three also agreed that he had an extensive smoking history, which was a factor in his illness. The disagreement among the Panel members concerned the role of toxic exposures associated

¹ www.eh.doe.gov/advocacy

with his work as a machinist. The majority stated that his exposures did not "cause" his COPD. The minority stated that his exposures "contributed" to his COPD.² The OWA accepted the majority opinion, and the Applicant appealed.

In her appeal, the Applicant acknowledges that smoking played a role in the Worker's illnesses but maintains that exposures at the plant also played a role. The Applicant states that the Worker machined uranium and was involved in a mercury spill. The Applicant also claims that the Worker was in perfect health until the age of 45 when he was suddenly struck with myriad illnesses, including problems with the kidney, colon, thyroid, heart, and brain.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Panel report - both the majority and minority opinions - did not clearly apply the Rule's standard. The majority appeared to apply an overly stringent standard, describing whether toxic exposures "caused" the COPD. The minority appeared to apply an overly lenient standard, describing whether the exposures "contributed" to the illnesses, rather than whether they were "a significant factor" in such contribution. Accordingly, we have concluded that reconsideration of the application is warranted. We note that, in the appeal, the Applicant states that the Worker became ill at an early age with a number of other illnesses and she mentions those illnesses. The Applicant should consider asking that those illnesses be included in any future consideration of her claim.

² The minority provided a detailed discussion of the toxic exposures of machinists at the site, as well as the risk of lung illness for that job.

In compliance with Subpart E, the application will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-317, be, and hereby is, granted.
- (2) Further consideration of the claimed illnesses, using the correct standard, is warranted.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 24, 2005